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In The
Supreme Court of the United States

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UNSCANNED

UNITED STATES OF AMERICA,
Petitioner,

v.

MARK JAMES KNIGHTS,
Respondent.

**On Writ of Certiorari To The
United States Court of Appeals
For the Ninth Circuit**

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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39 pp

TABLE OF CONTENTS

Table of Authorities iii

Interest of *Amicus* 1

Summary of the Argument 2

Argument 4

I. Introduction 4
   A. What this case is and what it is not 4
   B. An overview of probation and parole, its need as a criminal sanction, supervision, and recidivism rates 6

II. This warrantless police search of the home is presumptively unreasonable; Fourth Amendment "reasonableness" involving the home requires a sensitive inquiry into the interests involved. 13

III. The Fourth Amendment question in consent to search cases is voluntariness on the "totality of the circumstances," and mere acquiesce to a claim of authority is not consent. 15
   A. Reasonableness is the touchstone of every Fourth Amendment inquiry. 16
   B. The intent of the "Fourth Waiver" is pretextual criminal investigatory searches and is unconstitutional. 16
   C. Reasonableness "eschew[s] bright-line rules"; it evaluates instead the "totality of the circumstances." 17
   D. Voluntariness of consent and the totality of circumstances 19

E. The totality of circumstances of alleged probationer or parolee consents to search demonstrate that there is no knowing or voluntary waiver of the right to be free from unreasonable searches and seizures. 21
F. As a matter of reasonableness, a "Fourth Waiver" is not required in other jurisdictions, including the federal courts. 23
G. What about the rights of third persons? 25

IV. This search cannot be justified under the "special needs" exception; the motive of this search was purely for law enforcement purposes, and that removes it from "special needs." 25
A. There must be special needs "beyond the normal need for law enforcement" 26
B. "[B]alancing the need for the search against the invasion the search entails." 28

Conclusion 29

TABLE OF AUTHORITIES

CASES:

Amos v. United States, 255 U.S. 313 (1921) 19

Bond v. United States, 529 U.S. 334 (2000) 16

Brower v. City of Inyo, 489 U.S. 593 (1989) 15

Bumper v. North Carolina, 391 U.S. 543 (1968) 19

Camara v. Municipal Court, 387 U.S. 523 (1967) ... 14, 28

City of Indianapolis v. Edmond, 531 U.S. 32 (2000) 16, 26, 28

Diaz v. Ward, 437 F.Supp. 678 (S.D.N.Y. 1977) 25

Donovan v. Dewey, 452 U.S. 594 (1981) 16

Entick v. Carrington, 19 Howell's St. Tr. 1029, 95 Eng. Rep. 807 (K.B. 1765) 14, 28

Ferguson v. City of Charleston, 121 S.Ct. 1281 (2001) 16, 26, 27, 28

Florida v. Bostick, 501 U.S. 429 (1991) 17

Florida v. Jimeno, 500 U.S. 248 (1991) 16

Florida v. Royer, 460 U.S. 491 (1983) 17

Franks v. Maryland, 359 U.S. 360 (1959 14

Garrity v. New Jersey, 385 U.S. 493 (1967) 18, 20

Goldman v. United States, 316 U.S. 129 (1942) 14

Griffin v. Wisconsin, 483 U.S. 868 (1987) 4, 5, 6, 13, 16, 26, 27, 28

Johnson v. United States, 333 U.S. 10 (1948) .. 5, 13, 19, 22

Katz v. United States, 389 U.S. 347 (1967) 16

Kyllo v. United States, 121 S.Ct. 2038 (2001) 13, 14

Lefkowitz v. Turley, 414 U.S. 70 (1973) 18, 20

Marcus v. Search Warrant, 367 U.S. 717 (1961) 13

Michigan v. Chesternut, 486 U.S. 567 (1988) 17

Minnesota v. Murphy, 465 U.S. 420 (1984) 7, 20

New Jersey v. T.L.O., 469 U.S. 325 (1985) 26

New York v. Burger, 482 U.S. 691 (1987) 26, 27

Payton v. New York, 445 U.S. 573 (1980) 13, 18

Pennsylvania Board of Probation and Parole v. Scott, 524 U.S. 357 (1998) 4, 5

Richards v. Wisconsin, 520 U.S. 385 (1997) 18, 19

Robinette v. Ohio, 519 U.S. 33 (1996) 16, 17

Schnekloth v. Bustamonte, 412 U.S. 218 (1973) 19, 20

Silverman v. United States, 365 U.S. 505 (1951) 13

Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989) 28

State v. Johnson, 748 P.2d 1069 (Utah 1987) 25

Trupiano v. United States, 334 U.S. 699 (1948) 22

United States v. Chadwick, 433 U.S. 1 (1977) 5, 16

United States v. Eyler, 67 F.3d 1386 (9th Cir. 1995) 22

United States v. Leon, 468 U.S. 897 (1984) 5

United States v. Prendergast, 979 F.2d 1289 (8th Cir. 1992) 25

United States v. Rabinowitz, 339 U.S. 56 (1950) 10

United States v. Thomas, 135 F.3d 873 (2d Cir. 1998) ... 22

United States v. United States District Court, 407 U.S. 297 (1972) 13

United States v. West, 898 F.2d 1493 (11th Cir. 1990) ... 22

Welsh v. Wisconsin, 466 U.S. 740 (1984) 13

Whren v. United States, 517 U.S. 806 (1996) 16

Wilkes v. Wood, 19 Howell's St. Tr. 1153, 98 Eng. Rep. 489 (K.B. 1763) 14, 28

Wolf v. Colorado, 338 U.S. 25 (1949) 14

Zap v. United States, 328 U.S. 624 (1946), *vacated on other grounds*, 330 U.S. 800 (1947) 15, 18

CONSTITUTIONAL PROVISIONS:

Fourth Amendment ..... *passim*

STATUTES AND RULES:

18 U.S.C. § 3561(b) 21

18 U.S.C. § 3563(b)(16) 24

18 U.S.C. § 3583(a) 22

S.Ct. Rule 29.6 1

S.Ct. Rule 37.6 1

U.S.S.G. § 5B1.3(b) 25

U.S.S.G. § 5D1.1(a) 22

U.S.S.G. § 5D1.2(c)(10) 24

United States Parole Commission, Rules and Procedures Manual § 2.85(a)(12) (Mar. 1, 2001) 23

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Administrative Office of the U.S. Courts, Federal Corrections and Supervision Division, U.S. Probation and Pretrial Services, *Court & Community: An Information Series About U.S. Probation and Pretrial Services, Benefits of Supervision* (Sept. 2000) 9, 10

Paul W. Brown & Mark J. Maggio, *The Evolution of Officer Safety Training in the Federal Probation and Pretrial Services System*, 61 FED. PROB. 26 (No. 4, Dec. 1997) 5

Paul W. Brown, *The Continuum of Force in Community Supervision*, 58 FED. PROB. 31 (No. 4, Dec. 1994) ... 5

Loren A. N. Buddress, *Federal Probation and Pretrial Services–A Cost Effective and Successful Community Corrections System*, 61 FED. PROB. 5, 11 (No. 1, Mar. 1997) 8

California Legislative Analyst's Office, *California Counties: A Look at Program Performance, Part III* (May 1998) 11

2 NEIL P. COHEN, THE LAW OF PROBATION AND PAROLE ch. 17 (3d ed. 1999) 6, 7

Earnest J. DelGrasso, *Probation Officer Safety and Defensive Weapons: A Closer Look*, 61 FED. PROB. 45 (No. 2, June 1997) 5

DOJ BJS, *Probation and Parole Violators in State Prison, 1991* (1995) 11

DOJ BJS, *Recidivism of Felons on Probation, 1986-89* (Feb. 1992) 10

DOJ BJS, *Sourcebook of Criminal Justice Statistics* (1999) 10, 11

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DOJ, Office of Justice Programs, *Rethinking Probation: Community Supervision, Community Safety* 15 (Dec. 1998) 8, 12

4 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 10.10(b) (3d ed. 1996) 21

LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT (1966) 13

LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES (1937) 13, 14

2 LEGAL PAPERS OF JOHN ADAMS (1965) 14

Joan Petersilia, *A Crime Control Rationale for Reinvesting in Community Corrections,* 75 PRISON J. 479 (1995) 11

Joan Petersilia, *Probation in the United States: Practices and Challenges,* NAT'L INST. OF JUST. J. 4 (Sept. 1997) 11

Joan Petersilia, *A Decade of Experimenting With Intermediate Sanctions: What Have We Learned,* 62 FED. PROB. 3, 6 (No. 4, Dec. 1998) 8

Supreme Court of the State of New York, Conditions of Probation, S.C. Crim. Form No. 19 (April 1974) ... 24

Jay M. Zitter, Annot., *Validity of Requirement That, as a Condition of Probation, Defendant Submit to Warrantless Searches,* 2000 A.L.R.5th 3, § 10 (2000) 24

INTEREST OF *AMICUS*[1]

The National Association of Criminal Defense Lawyers (NACDL) is the preeminent organization in the United States advancing the mission of America's criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. A professional bar association founded in 1958, NACDL's more than 10,400 direct members–and more than 80 state and local affiliate organizations with over 28,000 members–include private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors, and judges committed to preserving fairness within America's criminal justice system. The American Bar Association recognizes NACDL as an affiliate organization and grants it full representation in its House of Delegates.

NACDL promotes study and research in the field of criminal law to disseminate and advance knowledge of the law in the area of criminal practice. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner. Among NACDL's objectives is promotion of the proper administration of justice. In furtherance of that objective, over the last decade, NACDL has filed approximately ten *amicus* briefs per year with this Court on criminal justice related issues.

NACDL members regularly litigate the issues involved in

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[1] Pursuant to S.Ct. Rule 37.6, counsel certifies that no counsel for party authored any part of this brief. No person or entity other than *amicus* made a monetary contribution to the preparation or submission of the brief.

Pursuant to S.Ct. Rule 29.6 on Corporate Disclosure Statements, NACDL is a nonprofit corporation. It has no parent corporation, and it is not a publicly held corporation, nor does a publicly held company own 10% or more of its stock.

this case, so they have an intimate awareness of the practical effects of probation on their clients and issues involving revocation of probation, including under search conditions as involved in this case.

The parties have consented to NACDL filing this *amicus* brief on behalf of the respondent, and the letters of consent are filed with this brief.

SUMMARY OF THE ARGUMENT

I. This is not a probation search because a probation officer was not involved. It is a probation search in name only because California caselaw permits law enforcement officers to conduct searches of probationers without legal justification. Probation and parole officers, "in contrast to police officers, are not engaged in the often competitive enterprise of ferreting out crime." Because they are engaged in law enforcement and not probation supervision, their goal is not maintenance of supervision–it is arrest and prosecution.

Probation is a necessary part of the criminal justice system. Not all offenders and offenses warrant incarceration, and probation can be summary, as in this case, or require intense supervision. Supervision is tailored to the needs of the offender. Indeed, for some offenders, incarceration or overly intensive supervision may be counterproductive and increase the likelihood of recidivism.

Amicus's recidivism statistics are different than those offered by the government's *amici,* and they show that fewer people recidivate than expected.

While probation and parole are necessary, may all probationers be constitutionally required to submit to searches of their homes as a condition of probation? This search was solely for law enforcement purposes, and there was no true consent beyond a court order or submission to a claim of lawful authority. This search fails every standard under which the

government seeks to justify it: the familiar rules of concerning the sanctity of the probationer's home, a probationer's knowing and voluntary waiver of consent to blanket searches without any justification by law enforcement officers investigating crime and not probation officers supervising them, reasonableness of a search under the totality of circumstances, and the "special needs" exception.

II. This warrantless police search of the home is presumptively unreasonable. An analysis of Fourth Amendment "reasonableness" involving the home requires a sensitive inquiry into the interests involved. Thus, warrantless entries into the home, even of the home of a probationer, are presumed unreasonable, and the government has a much heavier burden to sustain them.

Warrantless probationer searches of a probationer's home in California are no different than the "writs of assistance," "general warrants," or "roving commissions" condemned by the Framers of the Fourth Amendment.

III. The ultimate question in consent to search cases is voluntariness on the "totality of the circumstances." California probationers have no right to refuse such search conditions. Mere acquiesce to a claim of authority is not consent, and that is just what this case involves. There is no showing that this was a bargained for condition; it is routinely imposed without regard to the crime or the requirements of the offender. Consent is determined by objective standards, reviewing the totality of the circumstances. That makes this search unreasonable. The objective effect of these search conditions is a pretextual criminal investigatory search, and that also makes it unreasonable.

California probationers are subjected to a greater deprivation of liberty in these search conditions that federal parolees because only a federal parole officer can conduct a federal parole search. Everywhere other than California, the search term must bear some relation to the offender or the offense.

IV. The search also cannot be justified under the "special needs" exception because the programmatic purpose of these searches is criminal investigatory searches. No "special needs" case supports this form of search, and all of them require it be found unconstitutional.

Even balancing the interests involved still favors the accused, considering the fact that a home is the object of the search.

ARGUMENT

I. Introduction

A. What this case is and what it is not

The government does not contend that this search is a "probationer search" in the traditional sense of what that connotes: a probation officer making a home visit or, having a reason to believe that his or her charge is violating a law, bringing along a law enforcement officer to conduct a search, and that is a vital distinction. No one contends that bona fide probationer searches done by or at the behest of probation officers are invalid. Indeed, they are necessary to the successful operation of the probation and parole system. *Griffin v. Wisconsin,* 483 U.S. 868, 873-74 (1987).

The probation and parole system depends upon a probation officer-probationer relationship that is "more supervisory than adversarial." *Pennsylvania Board of Probation and Parole v. Scott,* 524 U.S. 357, 368 (1998), citing *Griffin,* 483 U.S. at 879.[2] The California "Fourth Waiver" rule, however,

[2] Government's *amicus* Criminal Justice Legal Foundation (CJLF) observes that probation officers are not the ideal candidates to be searching their clients because of lack of training, and it uses this as a justification for permitting law enforcement officers to

flouts this requirement. Probation and parole officers, "in contrast to police officers, are not engaged in the often competitive enterprise of ferreting out crime." *Scott,* 524 U.S. at 368, quoting *United States v. Leon,* 468 U.S. 897, 914 (1984), citing *United States v. Chadwick,* 433 U.S. 1, 9 (1977), quoting *Johnson v. United States,* 333 U.S. 10, 14 (1948).[3] Because they are engaged in law enforcement and not probation supervision, their goal is not maintenance of supervision–it is arrest and prosecution, pure and simple.

California's "Fourth Waiver" is contrary to the foundation of this Court's holding in *Griffin* and every case of this Court concerning the sanctity of the home, Fourth Amendment reasonableness, and knowing and voluntary consent. "A

have blanket search power over probationers. CJLF Br. at 11-12.

To the contrary, federal and state probation officers are trained in the use of force and search and seizure, and they have been since 1991. If there is a serious threat to safety, then law enforcement officers should be called in to assist. As to federal probation officers, *see:* Paul W. Brown, *The Continuum of Force in Community Supervision,* 58 FED. PROB. 31 (No. 4, Dec. 1994); Earnest J. DelGrasso, *Probation Officer Safety and Defensive Weapons: A Closer Look,* 61 FED. PROB. 45 (No. 2, June 1997); Paul W. Brown & Mark J. Maggio, *The Evolution of Officer Safety Training in the Federal Probation and Pretrial Services System,* 61 FED. PROB. 26 (No. 4, Dec. 1997).

[3] *Johnson* states, 333 U.S. at 13-14:

> The point of the Fourth Amendment, which is not often grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

probationer's home, like anyone else's, is protected by the Fourth Amendment's requirement that searches be 'reasonable.'" *Griffin*, 483 U.S. at 873.

B. An overview of probation and parole, its need as a criminal sanction, supervision, and recidivism rates

According to the Department of Justice's Bureau of Justice Statistics (BJS), found at the DOJ website, at the end of 1999 over two million Americans were incarcerated[4] and nearly 4.5 million were on probation or parole for misdemeanors and felonies.[5] Since 1996, over one million people have been convicted of felonies every year.[6] Obviously, not all of them go to prison. It is neither possible nor productive to society.[7]

Probation varies greatly with the gravity of the offense. It can be "summary probation" and extremely minor and unintrusive, as in respondent's case, where the offender never even has to report to a probation officer (let alone be supervised by one), or it can be extremely intense where the offender has to submit to random drug screens by being summoned in virtually daily by a computer generated telephone call, electronic monitoring, and regular home visits by his or her probation officer. 2 NEIL P. COHEN, THE LAW OF PROBATION AND PAROLE ch. 17 (3d ed. 1999).[8]

The government's *amici* imply that probation is necessary only because we do not have enough prison bed space to incarcerate every felon. Probation and parole professionals could not disagree more, and no *amicus* weighing in for the government involves any probation and parole professionals.[9]

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[4] http://www.ojp.usdoj.gov/bjs/pub/pdf/p00.pdf.

[5] http://www.ojp.usdoj.gov/bjs/pub/pdf/pp99pr.pdf.

[6] http://www.ojp.usdoj.gov/bjs/stssent.htm.

[7] *Amici* State of California and CJLF assert that without a viable "Fourth Waiver" provision, many more probationers will go to prison instead because the courts will refuse to impose probation without it. Calif. Br. at 10; CJLF Br. at 12-13. No other state seems to have this problem, and it is difficult to grasp the logic behind such a claim.

[8] *Id.* § 17:6:

> While large numbers of probationers and parolees are under actual supervision, some are released without any supervision at all. This frequently occurs when persons charged with minor offenses are placed on probation for a short period of time. Often the only condition is that they refrain from new criminal activity during the probation term.
>
> Unsupervised probation and parole have several advantages. First, this approach recognizes that some offenders do not need to be supervised. Their offense may have been the product of a unique situation that is unlikely to occur again. Another example is the seriously ill offender who is physically unable to leave home and does not need supervision to prevent recidivism. Second, by using unsupervised release for some offenders, the jurisdiction can focus its scarce resources on those persons most in need of intensive supervision. Despite the advantages of unsupervised probation or parole in appropriate cases, some authorities reject the concept, often reflexively rather than logically.

See also Minnesota v. Murphy, 465 U.S. 420, 432 (1984) ("the nature of probation is such that probationers should expect to be questioned on a wide range of topics relating to their past criminality.").

[9] *Amicus* State of California is the prosecuting authority that first charged respondent in this case before he was indicted federally. The other two are victims' rights advocates. *Amicus* Center for Community Interest (CCI) "provide[s] a voice for localities and community groups on public safety and quality-if-life issues." CCI

Not only is it impossible to incarcerate every person convicted, it can, depending on the offense and offender, be counterproductive to the offender and society by actually increasing the likelihood of recidivism.

Some felons admittedly have to be incarcerated because they cannot live among us. For most offenders, however, probation is the ideal and preferred method of dealing with their crime because the offense is not sufficiently grave and the offender not sufficient antisocial to warrant incarceration, and it allows the offender to pay back his victim by reparations and the community by community service. DOJ, Office of Justice Programs, *Rethinking Probation: Community Supervision, Community Safety* 15 (Dec. 1998).[10]

Indeed, for these offenders, incarceration or intensive supervision likely *increases* the likelihood that they will recidivate because the prison environment generally is not conducive to their rehabilitation. Loren A. N. Buddress, *Federal Probation and Pretrial Services–A Cost Effective and Successful Community Corrections System*, 61 FED. PROB. 5, 11 (No. 1, Mar. 1997); Joan Petersilia, *A Decade of Experimenting With Intermediate Sanctions: What Have We Learned*, 62 FED. PROB. 3, 6 (No. 4, Dec. 1998). Probation professionals recognize that supervision that is too intense can insure failure because there are often so many conditions that even offenders that would otherwise be expected to complete probation likely can fail. *Rethinking Probation, supra*, ch. 1-3. It is a self-fulfilling prophecy, and the government's *amici* seek to insure it.

For those whom probation would benefit, a supervision

Br. at 1. *Amicus* CJLF "seeks to bring the due process protection of the accused into balance with the rights of the victim and society to rapid, efficient, and reliable determination of guilty and swift execution of punishment." CJLF Br. at 1.

[10] http://www.usdoj.gov/probation/chap2.htm.

and treatment plan is developed that allows the probation officer to monitor their progress. The U.S. Probation and Pretrial Services branch of the Administrative Office of the U.S. Courts agrees:

> Many of supervision's benefits directly affect the safety of the community and the lives of the defendants and offenders under supervision. Listed below are six such benefits illustrated by actual probation and pretrial services cases.
>
> 1. Supervision gives officers the means to enforce conditions of release ordered by the court, such as those requiring persons to perform community service or pay fines and restitution. . . .
> 2. Supervision protects the public by reducing the risk that persons under supervision will commit future crimes. . . .
> 3. Supervision may provide substance abuse treatment to enable defendants and offenders to cope without relying on drugs or alcohol. . . .
> 4. Supervision may provide mental health treatment to enable defendants and offenders to function better in the community. . . .
> 5. Supervision may provide educational or vocational training that boosts defendants' and offenders' capacity to earn a living. . . .
> 6. As an alternative to incarceration, supervision allows individuals to live with their families, hold jobs, and be productive members of society. . . .

Administrative Office of the U.S. Courts, Federal Corrections and Supervision Division, U.S. Probation and Pretrial Services, *Court & Community: An Information Series About U.S. Probation and Pretrial Services, Benefits of Supervision*

(Sept. 2000).[11]

Recidivism rates vary according to the source and who is defining "recidivate." It makes all the difference in the world whether it means the offender committed a new crime or was merely revoked for non-payment of probation fees or failure to timely report. The latter are hardly an overt threat to the safety of the community where the offender resides.[12]

Government's *amicus*, CJLF, argues that the recidivism rate is 22-64%. CJLF Br. at 8. U.S. Government studies, however, show a recidivism rate for federal probationers as low as 5.4% (1998) and 11.7% (1997) assuming a new crime. While 81.3% of federal probationers in 1998 completed probation successfully with 5.4% committing a new crime, the remainder were revoked for "technical violations" such as drug use, becoming fugitives by not reporting, or other violations of conditions of probation. DOJ BJS, *Sourcebook of Criminal Justice Statistics* at 494, Table 6.13 (1999).[13] The numbers in 1997 were 64.8% with no violation and 11.7% with a new crime. *Id.* at 540, Table 6.74. For 1997 federal parolees, 59.6% had no violation, 13.0% having a new crime. In 1998, 55.8% had no violation and only 13.4% had a new

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[11] http://www.uscourts.gov/misc/ccbenefits.pdf.

[12] *See United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting):

> It is true also of journeys in the law that the place you reach depends on the direction you are taking. And so, where one comes out on a case depends on where one goes in. . . . It makes all the difference in the world whether one recognizes the central fact about the Fourth Amendment, namely, that it was a safeguard against recurrence of abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution, or one thinks of it as merely a requirement for a piece or paper.

[13] http://www.albany.edu/sourcebook/1995/pdf/section6.pdf. DOJ BJS supports the sourcebook. [Note that the link inexplicably shows a 1995 date. The documents show a 1999 date.]

crime. *Id.* at 542, Table 6.76.

In 1986-89, it was estimated that 49% of probationers would have a disciplinary hearing for some violation of some conditions of supervision. DOJ BJS, *Recidivism of Felons on Probation, 1986-89* at 6 (Feb. 1992). But, only *9%* of probationers were rearrested for a violent crime in that time period. *Id.* "Despite the desirability of predicting offender recidivism, available data and statistical methods are insufficient to do so very accurately at this time." Joan Petersilia, *Probation in the United States: Practices and Challenges,* NAT'L INST. OF JUST. J. 4 (Sept. 1997). Even in California, an accurate recidivism rate cannot be determined because the underlying data needed to make such a determination is of poor quality. California Legislative Analyst's Office, *California Counties: A Look at Program Performance, Part III* 6-7 (May 1998).

CJLF states in its brief that probation violators interviewed in prison claimed to have committed 6,400 "murders," 7,400 "rapes," 10,400 assaults, and 17,000 robberies while on felony probation. CJLF Br. at 9-10.[14] This overlooks the significant number of offenders like respondent who are on *misdemeanor* probation. Also, these claims are grossly speculative at best because the report they are derived from warns that the figures are projections which "should not be generalized to the entire prison population"; DOJ BJS, *Survey of State Prison Inmates, 1991,* at 2 (1995); based on self-reporting by prison inmates which tends, by its very source and nature, to be exaggerated. Joan Petersilia, *A Crime Control Rationale for Reinvesting in Community Corrections,* 75 PRISON J. 479 (1995). Moreover, there is also no way of knowing the time periods involved; *e.g.,* whether an inmate interviewed in 1991 was bragging about a murder (real or imagined) that

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[14] In the report, "murder" includes all non-negligent homicide and "rape" all sexual assaults. DOJ BJS, *Probation and Parole Violators in State Prison, 1991*, at 4, Table 1 (1995).

might have happened thirty or more years earlier when the inmate was on probation.

Probation and parole are a way of life in any criminal justice system, and none can operate without it. The public expects the probation and parole system to operate as well as it can, and it wants probationers and parolees who need supervision to be supervised. That really goes without saying. *Rethinking Probation, supra,* at 15. Whether the need for supervision, however, constitutionally justifies that *all* probationers, without regard to their offense or personal nature, be required to globally waive their constitutional rights for the entire period of probation is why we are here.

Amicus NACDL submits that the California rule requiring a "Fourth Waiver" as a condition of probation of all probationers violates the Fourth Amendment. This search was of the home of an unsupervised low risk misdemeanant by police officers conducted for an obviously and blatantly law enforcement purpose. The officers and even the government in this Court make no pretext that this search was for any purpose remotely related to the respondent's supervision as a probationer. Indeed, if respondent were on unsupervised probation, how can he be *post hoc* "supervised" by a search condition?

This case thus implicates questions of sanctity of the probationer's home, his or her knowing and voluntary waiver of consent to blanket searches without any justification by law enforcement officers investigating crime and not probation officers supervising them, reasonableness of a search under the totality of circumstances, and even the "special needs" exception. But, at bottom, this case rests on the immutable fact, disputed by no one, that this search was solely for law enforcement purposes, and there was no true consent beyond a court order or submission to a claim of lawful authority. It should fail any standard under which the government seeks to justify it.

II. This warrantless police search of the home is presumptively unreasonable; Fourth Amendment "reasonableness" involving the home requires a sensitive inquiry into the interests involved.

The history and language of the Fourth Amendment specifically protects the home from unreasonable searches and seizures: "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. United States District Court,* 407 U.S. 297, 313 (1972), quoted in *Welsh v. Wisconsin,* 466 U.S. 740, 748 (1984). Protection of the home is a "core value" of the Fourth Amendment; *Payton v. New York,* 445 U.S. 573, 584-85 (1980); and it recognizes "'the right of a man to retreat into his own home and there be free from governmental intrusion.'" *Silverman v. United States,* 365 U.S. 505, 511 (1951), quoted in *Payton,* 445 U.S. at 590, and *Kyllo v. United States,* 121 S.Ct. 2038, 2042 (2001). Thus, warrantless entries into the home are presumptively unreasonable; *Payton,* 445 U.S. at 586 & n. 25; *Kyllo,* 121 S.Ct. at 2043; even of the home of a probationer; *Griffin,* 483 U.S. at 873; and the government has a much heavier burden to sustain them. *Payton,* 445 U.S. at 587. "With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no." *Kyllo,* 121 S.Ct. at 2042.

The government's position in this case seeks to create virtual "writs of assistance," "general warrants," or "roving commissions" into the home of a huge number of "the people" entitled to protection of their homes under the Fourth Amendment. The infamous writs of assistance and general warrants were the reason for the Revolution and why the Framers required a Fourth Amendment. *See generally Marcus v. Search Warrant,* 367 U.S. 717, 724-29 (1961); LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT, ch. 1 (1966); LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH

AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, ch. 1-3 (1937); 2 LEGAL PAPERS OF JOHN ADAMS 105-47 (1965).

In England, just before our Declaration of Independence, courts authorized "roving commissions" permitting the arrest of anybody the government chose in an effort to apprehend the person they really wanted. They were held illegal in 1763. *Wilkes v. Wood,* 19 Howell's St. Tr. 1153, 98 Eng. Rep. 489 (K.B. 1763). Shortly thereafter, the next seed of the Fourth Amendment was sown in *Entick v. Carrington,* 19 Howell's St. Tr. 1029, 95 Eng. Rep. 807 (K.B. 1765), involving a general warrant for Entick's papers. Lord Camden, the judge in the case, held that there had to be a specific grant of authority for the government to conduct such a search. *Id.*, 19 Howell's St. Tr. at 1066.

That same year, William Pitt, a member of Parliament, made his historic speech against the unrestrained power of search:

> The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail–its roof may shake–the wind may blow through it–the storm may enter–the rain may enter–but the King of England cannot enter–all his force dares not cross the threshold of the ruined tenement.

Even Pitt's impassioned speech is considered a reason for the adoption of the Fourth Amendment. LANDYNSKI, supra, at 25; *Franks v. Maryland,* 359 U.S. 360, 378 (1959) (Douglas, J., dissenting) (overruled on other grounds, *Camara v. Municipal Court,* 387 U.S. 523 (1967)).

Entick has been regularly cited by this Court since 1936 as a primary source for our Fourth Amendment jurisprudence and thinking. *See, e.g., Goldman v. United States,* 316 U.S. 129, 129 (1942); *Wolf v. Colorado,* 338 U.S. 25, 30 (1949);

Brower v. City of Inyo, 489 U.S. 593, 596 (1989); *Kyllo,* 121 S.Ct. at 2042.

Warrantless searches of the home have been presumptively unconstitutional since the founding days of the Republic. California "Fourth Waivers" are no more than "writs of assistance" or "roving commissions." As such, they violate the Fourth Amendment.

III. The Fourth Amendment question in consent to search cases is voluntariness on the "totality of the circumstances," and mere acquiesce to a claim of authority is not consent.

The government strains to sustain this search as a blanket consent, relying on the acceptance of probation as an alternative to imprisonment and *Zap v. United States,* 328 U.S. 624 (1946), *vacated on other grounds,* 330 U.S. 800 (1947), a case requiring records inspection of a business as a condition of doing business with the government.

Even in evaluating consent, "reasonableness" and the "totality of the circumstances" are always the ultimate questions. Consent, in turn, is premised upon a knowing and voluntary waiver of a constitutional right. In this type of "Fourth Waiver" case, there can be no true and voluntary waiver. A probationer has no choice in California or elsewhere, and it matters not whether the probationer is on felony or misdemeanor probation. One would presume that a misdemeanor hot check writer would have more rights to be free from random investigative criminal searches than a burglar or drug dealer, but apparently not in California–they all are subject to warrantless searches on the whim of any law enforcement officer investigating crime without any pretense of any legal justification.

A. Reasonableness is the touchstone of every Fourth Amendment inquiry.

The "touchstone of the Fourth Amendment is reasonableness." *Florida v. Jimeno,* 500 U.S. 248, 250 (1991), citing *Katz v. United States,* 389 U.S. 347, 360 (1967), quoted in *Robinette v. Ohio,* 519 U.S. 33, 39 (1996). This Court has also referred to "reasonableness" as "the fundamental inquiry in considering Fourth Amendment issues." *Chadwick,* 433 U.S. at 9. *Accord: Griffin,* 483 U.S. at 873; *Donovan v. Dewey,* 452 U.S. 594, 602 (1981).

B. The intent of the "Fourth Waiver" is pretextual criminal investigatory searches and is unconstitutional.

While the intention of the officers is irrelevant in the basic Fourth Amendment inquiry; *Whren v. United States,* 517 U.S. 806, 813 (1996); this Court has held that Fourth Amendment reasonableness requires an appraisal of the programmatic purpose of a search to determine its reasonableness. *City of Indianapolis v. Edmond,* 531 U.S. 32, 45-46 (2000); *Ferguson v. City of Charleston,* 121 S.Ct. 1281, 1290 (2001). "[T]he issue is not his state of mind, but the objective effect of his actions." *Bond v. United States,* 529 U.S. 334, 338 n. 2 (2000).

The objective effect here could not be more clear: The conduct of criminal investigatory searches of the home by law enforcement officers without justification or a warrant; in short, searches of the home without any statutory, regulatory, or judicial control whatsoever. It is an anathema to every Fourth Amendment principle articulated by this Court.

C. Reasonableness "eschew[s] bright-line rules"; it evaluates instead the "totality of the circumstances."

In *Robinette,* a consent case, this Court further held that "[r]easonableness, in turn, is measured in objective terms by examining the totality of the circumstances." *Id.*, 519 U.S. at 39. Further:

> In applying this test we have consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry. Thus, in *Florida v. Royer,* 460 U.S. 491 (1983), we expressly disavowed any "litmuspaper test" or single "sentence or . . . paragraph . . . rule," in recognition of the "endless variations in the facts and circumstances" implicating the Fourth Amendment. 460 U.S. at 506. Then, in *Michigan v. Chesternut,* 486 U.S. 567 (1988), when both parties urged "bright-line rule[s] applicable to all investigatory pursuits," we rejected both proposed rules as contrary to our "traditional contextual approach." 486 U.S. at 572-573. And again, in *Florida v. Bostick,* 501 U.S. 429 (1991), when the Florida Supreme Court adopted a *per se* rule that questioning aboard a bus always constitutes a seizure, we reversed, reiterating that the proper inquiry necessitates a consideration of "all the circumstances surrounding the encounter." *Id.*, at 439.
>
> We have previously rejected a *per se* rule very similar to that adopted by the Supreme Court of Ohio in determining the validity of a consent to search.

Id.

What the Government and its *amici* seek is a "bright line rule" of probationer consent to avoid a "totality of the circumstances" analysis which would almost always come out

against them in the case of a warrantless criminal investigative search of a probationer's home based solely on his status.

Zap provides no support to the government that a blanket consent to search the home in this type of situation is valid. *Zap* involved a form of contractual consent to a review of business records as a condition of doing business with the government. Even assuming that *Zap* is still good law,[15] it can hardly be extended to permit an intensive search of the home, considering the heavy governmental burden in justifying any warrantless entry into the home.[16]

Government asserted blanket exceptions to any Fourth Amendment rule are disfavored because they obviate application of the "totality of the circumstances" test. For example, in *Richards v. Wisconsin,* 520 U.S. 385, 393-94 (1997), the Court rejected Wisconsin's blanket drug case exception to the

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[15] We submit, based on *Lefkowitz v. Turley,* 414 U.S. 70 (1973), that the rationale for *Zap* has been undermined, but that does not have to be decided because *Zap* is distinguishable because it does not involve a search of the home.

Lefkowitz, 414 U.S. at 82-83, held:

> A waiver secured under threat of substantial economic sanction cannot be termed voluntary. As already noted, *Garrity* specifically rejected the claim of an effective waiver when the policemen in that case, in the face of a possible discharge, provided in the face of possible discharge, proceeded to answer the questions put to them. 385 U.S., at 498. The same holding is implicit in both *Gardner* and *Sanitation Men.*

Lefkowitz thus casts significant doubt on the continued validity of *Zap.*

[16] If a routine felony arrest in the home needs a warrant under *Payton,* one would think that a routine investigative entry into a probationer's home must be governed by *some* standard to be constitutional.

knock-and-announce requirement. If one blanket exception is granted, government will have a tendency to seek to extend it to other types of cases.[17] *Id.* at 394. Also, "blanket rule[s] impermissibly insulate these [issues] from judicial review." *Id.* at 393.

D. Voluntariness of consent and the totality of circumstances

"When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority." *Bumper v. North Carolina,* 391 U.S. 543, 548-49 (1968), citing *Amos v. United States,* 255 U.S. 313, 317 (1921) (coercion not consent); *Johnson,* 333 U.S. at 13 ("It was granted in submission to authority rather than as an understanding and intentional waiver of a constitutional right.").

This Court has made it clear for nearly 30 years that the Fourth Amendment question in consent searches is whether consent is voluntary on the "totality of the circumstances." We submit that the government and its *amici*'s efforts to force this square peg into the round hole of "blanket," future, or global consent violate the precept that consent be shown to be voluntary on the totality of the circumstances.

In *Schnekloth v. Bustamonte,* 412 U.S. 218 (1973), the Court held that voluntariness of consent, like the voluntariness of confessions, was determined by the totality of the circumstances, and no one factor was controlling. *Id.* at 225-27. *Id.*

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[17] In fact, *Amicus*'s counsel has encountered cases where state prosecutors are seeking a waiver of the Fourth Amendment as a condition of pretrial release, obviously where the defendant still is cloaked with the presumption of innocence.

at 227:

> Similar considerations lead us to agree with the courts of California that the question whether a consent to a search was in fact "voluntary" or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances. While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the sine qua non of an effective consent. As with police questioning, two competing concerns must be accommodated in determining the meaning of a "voluntary" consent–the legitimate need for such searches and the equally important requirement of assuring the absence of coercion.
>
> . . .
>
> But the Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion was applied, the resulting "consent" would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed.

This Court has held that a state cannot force a probationer to incriminate him or herself under pain of revocation. *Murphy,* 465 U.S. at 435, 436-37. *Accord: Garrity v. New Jersey,* 385 U.S. 493 (1967) (police officer cannot be compelled to assert his privilege against self-incrimination if it will result in discharge). *See Lefkowitz v. Turley, supra.*

E. The totality of circumstances of alleged probationer or parolee consents to search demonstrate that there is no knowing or voluntary waiver of the right to be free from unreasonable searches and seizures.

We know here it truly is a manifest fiction to claim that respondent knowingly and voluntarily waived his right to be free from warrantless searches on the whim of any law enforcement officer. *See* 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 10.10(b), at 764-65 (3d ed. 1996) ("to speak of consent in this context is to resort to a manifest fiction, for the probationer who purportedly waives his rights by accepting such a condition has little genuine option to refuse"), quoted in Brief of U.S. at 23 n. 12. Many probationers seek probation for obvious reasons, but many get no choice in probation. Indeed, society does not want to incarcerate them and run the risk of turning a marginal criminal into a professional one. What is worse, however, is that this condition is imposed on *every* defendant in California, without regard to the nature of the offender or the offense and whether the condition is necessary to the rehabilitation of any one defendant.

In respondent's case, he was subjected to a pattern condition printed on a form of the Napa County Municipal Court.[18] There was no bargaining here and there is no consideration for this alleged contract. Indeed, respondent's purported threat to the community that allegedly justified this blanket condition was considered so slight that he was placed on summary pro-

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[18] On planning to go to court in Napa County could go to the Napa County Adult Probation Services Webpage to look into conditions of probation, and he or she would find no notice that there is a blanket search condition for probation. http://www.co.napa.ca.us/internet/content/departments/Probation/ProbAdult.asp.

bation that did not even require that he report to the probation office. The fact everybody gets this search condition shows nothing about need–just law enforcement convenience, and law enforcement convenience is not a sufficient ground to dispense with the protections of the Fourth Amendment. *Johnson,* 333 U.S. at 15; *Trupiano v. United States,* 334 U.S. 699, 706 (1948).

In addition, many offenders may be placed on probation against their will; *i.e.,* they will have no choice but to be placed on probation because the court is not going to imprison them and take up precious bed space for a low level offense. *See, e.g.,* 18 U.S.C. § 3561(b) (court must probate defendant if it will not incarcerate for some crimes). As in California and most other states, supervised release in the federal system is compulsory after a prison term. 18 U.S.C. § 3583(a); U.S.S.G. § 5D1.1(a). It is additional punishment. *United States v. West,* 898 F.2d 1493, 1504 (11th Cir. 1990); *United States v. Eyler,* 67 F.3d 1386, 1393 (9th Cir. 1995) ("The provision of just punishment is not a criterion for supervised release conditions."); *United States v. Thomas,* 135 F.3d 873, 875 (2d Cir. 1998).

Amicus submits that the distinction between consent or lack of consent in this case is ultimately meaningless to the Court's evaluation of reasonableness of this type of search. If the government's blanket consent argument is accepted, it would of necessity have to apply to all probationers, whether they consented to a search term or had it forced upon them. Otherwise, it would be unworkable. After all, how would a law enforcement officer bent on searching a probationer know whether that probationer consented to a search term or not? Thus, the government's position on the surface must be based on consent to make it sound reasonable, but it cannot rely on consent at all in its application. That being the case, the government's consent theory is deprived of its rationale, and that makes a search conducted under it unreasonable.

F. As a matter of reasonableness, a "Fourth Waiver" is not required in other jurisdictions, including the federal courts.

The power asserted by the State of California and the United States in this case is extraordinary.

A California probationer, someone who never went to jail for his crime, has less rights to be free from a search than does a federal parolee because a federal parolee is only subject to search by his or her "parole officer." United States Parole Commission, Rules and Procedures Manual § 2.85(a)(12) (Mar. 1, 2001).[19] The Parole Commission disfavors searches by parole officers. If there is reason to believe the parolee committed a crime, then law enforcement officers should conduct the search. *Id.*, Notes and Procedures § 2.85-20.[20]

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[19] http://www.usdoj.gov/uspc/rules_procedures/rulesmanual.htm:

> (12) The parolee shall permit visits by his Supervision Officer to his residence and to his place of business or occupation. He shall permit confiscation by his Supervision Officer of any materials which the officer believes may constitute contraband in the parolee's possession and which he observes in plain view in the parolee's residence, place of business or occupation, vehicle(s), or on his person. The Commission may also, when a reasonable basis for so doing is presented, modify the conditions of parole to require the parolee to permit the Supervision Officer to conduct searches and seizures of concealed contraband on the parolee's person, and in any building, vehicle, or other area under the parolee's control, at such times as the officer shall decide.

[20] *Id.:*

> (a) Search Policy. Searches by Supervision Officers are

Home visits are not mandatory conditions of probation in the federal system–they are only discretionary with the sentencing court. 18 U.S.C. § 3563(b)(16) ("permit a probation officer to visit him at his home or elsewhere as specified by the court"); U.S.S.G. § 5D1.2(c)(10) ("The defendant shall permit a probation officer to visit the defendant at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer . . . .")

Similarly, the normal conditions of felony probation in New York City mention no more than home visits. Supreme Court of the State of New York, Conditions of Probation, S.C. Crim. Form No. 19, condition 2 (April 1974) ("Permit the probation officer to visit him at his home or elsewhere").[21]

Few cases permit law enforcement officers to conduct probation searches. Jay M. Zitter, Annot., *Validity of Requirement That, as a Condition of Probation, Defendant Submit to Warrantless Searches,* 2000 A.L.R.5th 3, § 10 (2000).

It is possible that a narrowly tailored full search condition could be imposed as a special condition of probation, but caselaw practically everywhere outside of the state courts of California would require that the search term bear some rela-

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disfavored. Other techniques should be relied upon to monitor compliance with conditions of supervision and, when information exists that indicates possession of contraband or evidence of a crime, consideration should be given to referring the matter to an appropriate law enforcement agency for investigation. When there are no other alternatives, searches should be conducted only (1) pursuant to conditions of release that specifically permit such searches or (2) pursuant to the consent of the parolee freely and voluntarily given.

[21] Source: New York City Department of Probation Operations, 33 Beaver St., 22nd Floor, New York, New York 10004 (received by fax, August 2001).

tion to the needs of the offender and society. *See, e.g., United States v. Prendergast,* 979 F.2d 1289, 1293 (8th Cir. 1992) (terms of probation must be reasonably related to the offense, the history of the defendant, and only as extensive as "reasonably necessary to effect the purposes of sentencing"; U.S.S.G. § 5B1.3 (b)).

G. What about the rights of third persons?

Discussed nowhere in the briefs is the rights of innocent third persons. If a probationer can be compelled to submit to warrantless searches by any law enforcement officer in America without regard to the gravity or nature of the offense, what about the people that live with the probationer? Do not the probationer's children, parents, spouse, or roommates have any say in the matter? Can they be subjected to a search merely because of whom they choose to live with or whom they must live with? *See State v. Johnson,* 748 P.2d 1069 (Utah 1987) (limited expectation of privacy remains for the others); *Diaz v. Ward,* 437 F.Supp. 678 (S.D.N.Y. 1977) (civil rights case; families of parolees retain privacy rights sufficient to survive motion to dismiss).

IV. This search cannot be justified under the "special needs" exception; the motive of this search was purely for law enforcement purposes, and that removes it from "special needs."

For the "special needs" exception to apply, there must be a governmental need for the search beyond the normal need for law enforcement. Where the search is for law enforcement purposes, as was this one, there are no special needs justifying dispensing with the requirements of the Fourth Amendment. Otherwise, the government could always conjure up a "special need," and the protections of the Fourth Amendment would be obviated.

A. There must be special needs "beyond the normal need for law enforcement"

The "special needs" exception was first recognized by the Court in *New Jersey v. T.L.O.*, 469 U.S. 325, 332 n. 2 (1985). Justice Blackmun concurred and limited it: "Only in those exceptional circumstances in which special needs, *beyond the normal need for law enforcement,* make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers." *Id.* at 351 (concurring opinion; emphasis added). *Ferguson,* 121 S.Ct. at 1286 n. 7.

Shortly thereafter, the special needs exception was equated with administrative searches in *New York v. Burger,* 482 U.S. 691, 702 (1987), "where the privacy interests are weakened and the government interests regulating particular businesses are concomitantly heightened, a warrantless inspection of commercial premises may well be reasonable within the meaning of the Fourth Amendment." The Court recognized, however, that even the administrative search rationale provides no support to the government's position if the search was ulteriorly for an investigative purpose. *Burger,* 482 U.S. at 716 n. 27 ("There is, furthermore, no reason to believe that the instant inspection was actually a 'pretext' for obtaining evidence of respondent's violation of the penal laws. It is undisputed that the inspection was made solely pursuant to the administrative scheme.").[22]

This Court's probation search case, *Griffin v. Wisconsin*, was decided one week after *Burger*, and the Court held that probation "[s]upervision . . . is a 'special need' of the State permitting a degree of impingement upon privacy that would not be constitutional if applied to the public at large. *That*

[22] *Burger* was cited in *Edmond*, 531 U.S. at 31, as an example of a programmatic inquiry into purpose of the search.

permissible degree is not unlimited, however, so we next turn to whether it has been exceeded here." *Id.,* 483 U.S. at 875 (emphasis added). The Court proceeded to evaluate the statutory structure of the Wisconsin state probation system, and it concluded the state system satisfied the reasonableness requirement of the Fourth Amendment.

This Court found it significant that the search was conducted by a probation officer and not a law enforcement officer. *Id.* at 876 ("Although a probation officer is not an impartial magistrate, neither is he the police officer who normally conducts searches against the ordinary citizen."). The structure of the Wisconsin system required that the probation officer have reasonable grounds to believe that the probationer was in violation of a condition of probation, and that made it constitutional. *Id.* at 870-71, 875-76. Most notably, everything that the Court relied on in *Griffin* to sustain Wisconsin's probation search system is absent from this case.

Last Term, this Court decided *Ferguson,* 121 S.Ct. at 1290: "In looking to the programmatic purpose, we consider all the available evidence in order to determine the relevant primary purpose." The police in *Ferguson* were extensively involved in the development of the medical center's policy and in deciding who received the relevant information. *Id.* Also, it was apparent that the policy was developed for law enforcement purposes. *Id.* at 1291-92:

> Because law enforcement involvement always serves some broader social purpose of objective, under respondents' view, virtually any nonconsensual suspicionless search could be immunized under the special needs doctrine by defining the search solely in terms of its ultimate, rather than immediate, purpose. Such an approach is inconsistent with the Fourth Amendment. Given the primary purpose of the Charleston program, which was to use the threat of arrest and prosecution in order to force

women into treatment, and given the extensive involvement of law enforcement officials at every stage of the policy, this case simply does not fit within the closely guarded category of "special needs." (footnotes omitted)

B. "[B]alancing the need for the search against the invasion the search entails."

The Court has long relied on a balancing of interests in determining whether a particular intrusion is unreasonable.

> [T]he Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable. . . . What is reasonable, of course, "depends on all the circumstances surrounding the search or seizure and the nature of the search or seizure itself." . . . Thus, the permissibility of a particular practice "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion or legitimate governmental interests."

Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 618 (1989). *See Camara v. Municipal Court,* 387 U.S. 523, 536-37 (1967) (also, "there can be no ready test for determining reasonableness other than balancing the need to search against the invasion which the search entails.").

Balancing of interests here clearly favors the individual because law enforcement officers are using a probation condition as an excuse to conduct a general criminal investigatory search of the home. Under *Griffin, Edmond,* and *Ferguson,* not to mention *Wilkes v. Wood* and *Entick v. Carrington,* the search is unreasonable.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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